ST 02-18
Tax Type: Sales Tax
Issue: Tangible Personal Property for Rental Purposes

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE	) 01 ST 0000
STATE OF ILLINOIS	) NTL 000000000000000
	) 0000-0000
v.	) Mimi Brin
	) Administrative Law Judge
ABC RENTAL CORP.	)

RECOMMENDATION FOR DISPOSITION

Appearances: Brian Wolfberg of Schain, Burney, Ross & Citron, Ltd. for ABC Rental Corp.; John Alschuler, Special Assistant Attorney General for the Illinois Department of Revenue

This matter comes on to be heard following ABC Rental Corp.'s (hereinafter the "Taxpayer" or "ABC") protest of Notice of Tax Liability no. 00 0000000000000 (hereinafter the "NTL") issued by the Illinois Department of Revenue (hereinafter the "Department"). The NTL is based upon the Department's denial of a credit taken by this taxpayer against its Use Tax liability to Illinois on its use of certain of its equipment in this state following the prior use of the equipment in Wisconsin. The credit taken by the taxpayer was for general sales and use tax paid in Wisconsin by taxpayer's Wisconsin lessee, which, in turn, leased the equipment to other entities in Wisconsin. The act by the Wisconsin lessee of leasing to others triggered the imposition of a Wisconsin general sales and use tax obligation on taxpayer's lessee, as Wisconsin imposes its pertinent tax

on, not only owners of tangible personal property who use same in the state, but, also on lease transactions, including those of a lessee who subsequently subleases such property.

ABC filed a Motion for Summary Judgment (hereinafter the "Motion"), that was responded to by the Department. The motion was denied in an Order dated January 17, 2002. Rather than proceed to a formal hearing on the issue presented by this case, the parties agreed to stand on the pleadings filed, including the facts established therein. Order, February 28, 2002. Following a review of the documents of record, and following argument made by the respective counsel in this cause, it is my recommendation that this matter be resolved in favor of the taxpayer. In support of this determination, I make the following findings of fact and conclusions of law:

Findings of Fact:

1. Taxpayer, a corporation headquartered in Anywhere, Ohio, is in the business of selling and renting cranes throughout North America. Motion ¶ 1; Department' Response ¶ 1
2. XYZ Crane Rental, Inc. (hereinafter "XYZ") a corporation affiliate of ABC, does business from several locations in the State of Wisconsin. Motion ¶ 3; Department's Response ¶ 2
3. All of the stock in ABC and XYZ is owned by the Doe family. Motion ¶ 4
4. Taxpayer is the owner of the equipment that is the tangible personal property at issue (hereinafter the "Property"). Motion ¶ 6; Department's Response ¶ 3

5. Taxpayer acquired the property outside Illinois. Motion ¶ 7; Department's Response ¶ 4

6. Taxpayer leased the property to XYZ in Wisconsin. Id.

7. XYZ rented or subleased the property to various users in Wisconsin. Motion ¶ 8; Department's Response ¶ 5

8. XYZ collected and paid to the State of Wisconsin, sales and use tax on its rental or lease receipts on these rentals or leases. Motion ¶ 9; Department's Response ¶ 6

9. XYZ subsequently brought the property into Illinois and subleased or rented the equipment to various Illinois customers. Motion ¶ 10; Department's Response ¶ 7

10. Taxpayer, as the owner of the property, paid Illinois Use Tax on this property brought into Illinois. Motion ¶ 11; Department's Response ¶ 8

11. In calculating its Use Tax liability, taxpayer calculated depreciation against the cost price of the property for the period of time the property was used outside of Illinois prior to entering the state. Motion ¶ 12; Department's Response ¶ 9

12. As part of its calculation as to the amount of Use Tax it owed to the Department, Taxpayer also took a credit for sales and use tax paid in Wisconsin by XYZ. Motion ¶ 13; Department's Response ¶ 10

13. The Department performed an audit of taxpayer for the tax years January 1997 through June 1999. The Department disallowed from taxpayer's Use Tax calculations, the credit for taxes paid by XYZ to Wisconsin, and

issued Notice of Tax Liability 00 0000000000000[1] that taxpayer timely protested. Motion ¶¶ 14, 15; Department's Response Attachment A (NTL; Audit Correction and/or Determination of Tax Due)

CONCLUSIONS OF LAW:

In Illinois, "use" is defined, in pertinent part, as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property… ." 35 ILCS 105/2 ABC concedes that, as the owner of the property at issue, it is required to pay the Illinois Use Tax, 35 **ILCS** 105/1 *et seq*., (hereinafter the "UT" or the "UTA") to Illinois for the use of its property in this state by entities that rented or leased the property from XYZ. 35 **ILCS** 105/3 However, it avers that it is statutorily permitted to take a credit from its Illinois UT liability for the sales and use tax paid by XYZ to the State of Wisconsin, as set forth in UTA section 3-55 (d), that reads, in pertinent part:

> § 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:
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> (d) The use, in this State, of tangible personal property that is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other State.

35 **ILCS** 105/3-55(d)

Wisconsin also has a General Sales and Use Tax, that is imposed in chapter 77 of the Wisconsin statutes. Specifically, a sales tax is imposed on the selling, leasing or

[1] Taxpayer, in ¶ 15 of its Motion, cites the NTL number as 0000000000000000 in the amount of $91,865.00. The NTL, as attached to the Department's Response, is numbered 000000000000000, for the

renting of tangible personal property at retail. **W.S.A**. 77.52(1) Further, Wisconsin statutorily defines relevant terms as follows:

> "Sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services and includes:
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> ****
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> (j) The granting of possession of tangible personal property by a lessor to a lessee, or to another person at the direction of the lessee. Such a transaction is deemed a continuing sale in this state by the lessor for the duration of the lease as respects any period of time the leased property is situated in this state, irrespective of the time or place of delivery of the property to the lessee or such other person.

W.S.A. 77.51 (14)(j)

Taxpayer argues that it was liable for Wisconsin sales and use tax as a result of its lease of the property to XYZ. As Wisconsin imposes a sales tax on the leasing or renting of tangible personal property, as well as on the outright sale of same, a plain reading of Wisconsin's sales tax statute, as cited above, affirms taxpayer's position.

However, Wisconsin, under the same statutory authority as cited above, also imposes the same tax on a transaction that occurs when a lessee, in turn, leases or rents the same tangible personal property to another. As provided in Wisconsin regulation:

> Tax 11.29 Leases and rental of tangible personal property.
>
> (1) General rule. Gross receipts from the lease or rental of tangible personal property shall be subject to the sales and use taxes to the same extent that gross receipts from the sale of the same property would be subject to the tax. Because a lease is a continuing sale for the duration of the lease while the leased property is situated in Wisconsin under s. 77.51 (14) (j), a lessor shall pay tax on rental receipts for any period of time leased property is in Wisconsin, even though the

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same amount. I conclude that taxpayer's citation is a scrivener's error and does not present a difference between the parties of a material fact.

> property may have been acquired, used or both previously by the lessee in another state.

Wis. Admin. Code s Tax 11.29

Since Wisconsin imposes its general sales and use tax on the leasing of tangible personal property in the state, ABC is liable to Wisconsin for its lease of tangible personal property to XYZ. It is equally true, though, that when XYZ re-leased or rented the property to another in Wisconsin, it also made a sale at retail, **W.S.A**. 77.51, and, therefore, was also liable to Wisconsin for the sales tax. Under such a circumstance, Wisconsin deems the first transaction, that is, the original lease between ABC and XYZ, to be a sale for resale. As such, the tax is not imposed on the owner and original lessor of the property. Sanfelippo v. Wisconsin Department of Revenue, 170 Wis.2d 381 (1992)[2]

ABC argues that, as owner and lessor of the property at issue, it incurred the sales tax liability in Wisconsin. It claims that, pursuant to Philco Corporation v. Department of Revenue, 40 Ill.2d 312 (1960),[3] it matters not that its lessee, XYZ, collected the tax from its sub-lessee and remitted it to Wisconsin-the remittance was for the benefit of ABC. Taxpayer's Reply, pp.6-7. Relying on Philco, taxpayer argues that it is properly entitled to a credit for the taxes paid by XYZ to Wisconsin in calculating its Illinois use tax liability, as was the Philco taxpayer.

Although the taxpayer claims that there is no distinction between the taxpayer in Philco and itself, in my analysis for purposes of the summary judgment motion, I agreed

[2] Sanfelippo owned several taxi cabs, that he leased to drivers for sums certain each week. The Wisconsin Department of Revenue sought to impose the sales tax on him measured by the gross lease receipts he received from the lessee drivers. Sanfelippo argued that the drivers actually leased the taxis each time they took a fare and served the passenger public, therefore, his leases to the drivers were resales and not taxable to him. Id. at 385 The court determined that the drivers did not "resell" the leased cabs to their passengers, that in fact, the act of picking up a fare was not a lease situation. Thus, Sanfelippo was liable for the sales tax measured by the gross receipts of the lease payments.

with the Department and concluded that there was a distinction that caused the outcome of this matter to differ from that in Philco. In Philco, taxpayer, Rental, was a Missouri corporation engaged in the business of renting heavy construction equipment, some of which was used in Illinois by lessees. Philco at 315 Rental was liable for and paid sales tax to the state of Missouri on some of the equipment that it leased in Missouri and then subsequently leased in Illinois. Id. at 316 The Illinois Department of Revenue assessed Rental use tax on this equipment when it came into Illinois, but did not allow a credit for the tax that was paid on this property in Missouri. The Department argued that since Rental passed its Missouri tax liability to its Missouri lessees, it, itself, did not really pay the tax in Missouri, and therefore, no credit was allowed. Id. at 326-7

The Illinois Supreme Court did not agree. It recognized that, in accord with a Missouri statute, Rental passed the tax on to its Missouri lessees by way of a tax imposed on the amount of rent paid. Id. at 327 In its analysis of the multi-state exemption provision of the UTA, currently at 35 **ILCS** 105/3-55,[4] the court recognized that under a literal reading of the statute, Rental was not the entity that had paid the tax in Missouri since it had passed the burden of the tax to its lessees. However, the court determined that Rental was entitled to the credit for the tax paid in Missouri as:

> …this literal reading of the exemption is not justified. The legislative purpose is to 'prevent actual or likely multi-state taxation.' That purpose is not served by an interpretation that centers upon the identity of the person who makes the payment to the exclusion of the economic effect of the tax. Whether actual payment of the tax levied by another State is made by the buyer or the seller, or by the lessee or the lessor, is not material to the legislative purpose of avoiding multi-state taxation.

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[3] Philco consolidated two separate cases that had similar factual situations and legal contentions, with one taxpayer being Philco Corporation, and the other being Rental Equipment Company, Inc. Philco at 314

[4] At the time of the Philco decision, this provision was found at Ill. Rev. Stat. ch. 120, par. 439.3-55 and was substantively the same as the pertinent provision in this matter.

Philco at 327

The Department in this matter argues that Philco does not apply in this instance for a number of reasons, including, *inter alia*, that there is no direct economic relationship between ABC and XYZ whereas in Philco, there was such a relationship between Rental and its lessees. Department's Response ¶ 5 It further avers that whereas Rental remained liable for the payment of the tax by either paying its vendor at the time of purchase or paying the tax based upon the lease payments, ABC was not liable for the tax in Wisconsin. Department's Response ¶¶ 3, 4 In essence, the Department's position is that the Illinois credit for use taxes paid is for the benefit of the specific taxpayer that is liable for the taxes in Illinois as well as in another venue. Conversely, taxpayer states that ABC did have the responsibility for the tax payment in Wisconsin, Taxpayer's Response pp. 5, 6-7, and, further, that it does not matter, because under Philco, it is the type of tax previously paid, for specific equipment, that is the concern. Id. at 7

In my denial of taxpayer's summary judgment motion, I concurred with the Department and concluded that based upon the structure of the Wisconsin general sales and use tax provisions, XYZ, an entity separate and apart from ABC, was legally liable for those use taxes. Thus, since ABC had no such tax burden in Wisconsin, there was no danger of multi-state taxation, the ill intended to be avoided by the Illinois credit.

Following my order of denial, the parties orally argued the matter at the time they submitted it without further additions to the record. Although it remains clear to me that XYZ is the entity that was statutorily responsible for the payment of the Wisconsin general sales and use tax based upon its subleasing of the equipment owned and leased to

it by ABC, I now conclude that taxpayer's position more accurately reflects the intent and purpose of the pertinent Illinois credit for previously paid use taxes.

Initially, I note that the reported cases that address the issue of the credit concern facts that are distinguishable from these. In Philco, the taxpayer was clearly being taxed twice for its ownership and use of the same property in both states. Thus, the economic effect of the tax was on Rental in both Missouri and Illinois, and the Illinois court determined that it did not matter from where Rental received its funds to pay the tax for which it was liable.

Likewise, in United Airlines, Inc. v. Johnson, 84 Ill.2d 446 (1981), a case relied upon by this taxpayer during argument, the airlines paid Illinois use tax on aviation fuel it bought from Shell Oil Company in Indiana, that it stored in Illinois prior to its use from Illinois airports. United also paid Shell an amount of money equal to amount it paid Shell to satisfy Shell's Indiana gross income tax obligation incurred by Shell as a result of this sale. United claimed, *inter alia*, a credit in Illinois for this tax citing the credit provision of the UTA, averring that to deny it the credit would subject it to multi-state taxation. Id. at 449

The court denied United the credit for the monies it paid to Indiana to satisfy Shell's gross income tax obligation. After detailing the history, purpose and interaction of the Illinois Retailers' Occupation Tax and the Illinois Use Tax, as well as the Indiana gross income tax and its use tax, the court determined that:

> the Indiana gross income tax is not a tax 'in respect to the sale, purchase or use of' property within the meaning of section 3(c) of our Use Tax Act. The mere fact that United contracted to pay Shell's gross income tax liability does not entitle United to an exemption from the Illinois use tax any more than if United

> would have contracted to pay any other of Shell's direct tax obligations.

Id. at 454

The United court, referring to the Philco decision, reiterated that the Illinois Supreme Court found that:

> the focus was on whether the tax paid in Missouri was the type of tax for which the General Assembly intended to give credit against use tax liability. This court found that the tax paid by the Missouri lessees was a sales tax, and accordingly Rental was entitled to a credit in that amount against its use tax liability in Illinois.

Id. at 455

In this matter, there is no question but that the taxes paid by XYZ in Wisconsin were pursuant to that state's general sales and use tax statutes, and were based upon the use in Wisconsin of equipment owned by ABC. This is the same equipment that ABC paid use tax on in Illinois based upon its ownership interest while the equipment was used here. Thus, the taxes paid by XYZ in Wisconsin and the use tax paid in Illinois by ABC are the same type of tax, resulting from the use of the same property in each state.

This matter turns, however, on whether ABC can properly receive a credit for taxes paid by XYZ, not as taxpayer's lessee as in the Philco case, but, for which XYZ had its own, independent statutory responsibility, albeit for property owned by ABC. My determination in taxpayer's summary judgment motion focused on the distinction that, as a matter of law, ABC did not have a tax burden in Wisconsin because XYZ' releasing of the property turned the lease between ABC and XYZ into the equivalent of a sale for resale. See Sanfelippo v. Wisconsin Department of Revenue, 170 Wis.2d 381 (1992). Following my prior determination, the parties appeared and argued the merits of their

positions, and, although neither raised new case law, my subsequent research causes me to reverse my prior recommendation.

It was during their arguments on the merits that taxpayer emphasized that although ABC may not have been statutorily responsible for the sales or use tax in Wisconsin as a result of the lease of its equipment to XYZ in that state, it remained, at all times, the owner of that property. In that respect, its lease of the equipment to XYZ in Wisconsin represented its exercise of its ownership right to allow another use of its equipment. Further, XYZ' subleasing of the equipment, both in Wisconsin and in Illinois was also done as a result of the exercise, by ABC, of its ownership rights-that being the right to allow its own lessee to sublease. In fact, the Department does not disagree that ABC remains the owner of the property and is recognized as such by its liability for and its payment to Illinois of the use tax even though XYZ actually caused the property to be brought into Illinois and subleased or rented the equipment to various Illinois customers. See also Philco Corp. v. Department of Revenue, supra.

The Illinois UT and the Wisconsin general sales and use tax are imposed upon the privilege of use. In the case of Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937), the United States Supreme Court, in addressing the Washington state use tax, discussed multi-state taxation of tangible personal property moving in interstate commerce. Concerning the application of a use tax on property acquired by retail purchase, the court stated that:

> The privilege of use is only one attribute, among many, of the bundles of privileges that make up property or ownership.
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> XXXXXX
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> …property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same

> within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.
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> XXXXXX
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> There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

Id. at 582, 583, 584

ABC had continuous ownership of the property while it was being used in Wisconsin by XYZ, including during those times that XYZ subleased or rented it to others. It's ownership interest during those times in Wisconsin was no less than its ownership interest in the property when XYZ subleased it and caused it to be brought into Illinois pursuant to those leases. The Department, as well as ABC, acknowledge ABC's ownership interest in the property while it was in Illinois, and, in fact, both agree that Illinois' UT applies to this use. However, taxpayer's ownership interest in the property, as well as its exercise of some of its ownership rights, was no different in Wisconsin as a result of XYZ' subleasing actions. Thus, ABC used the property in both states in the same manner, that is, it allowed its lessee additional rights that involved subleasing or further renting.

There is no argument that ABC and XYZ are distinct legal entities. Nor is there a question that XYZ was responsible to Wisconsin for the general sales and use tax based

upon its subleasing of ABC's property. But, the taxpayer did not give up its ownership of the property during the time that XYZ used it, and, therefore, ABC continued to use this property by allowing XYZ' further uses. The Wisconsin general sales and use tax was calculated upon XYZ' subleases, which were, actually, but a part of ABC's ownership rights. The Illinois UT is calculated on the property's fair market value. In each state, the tax is upon the privilege of use, and, in each state, ABC, as the owner, used the property. In applying these facts, the point that ABC did not bear the burden of the tax in Wisconsin is not the focal point, as, under Philco, "the identity of the person who makes the payment" does not control over the economic effect of the tax. In both states, the economic effect of each tax is upon this taxpayer, although it is calculated on different aspects of the taxpayer's ownership rights.

As a result of this subsequent analysis, I must reverse my order entered pursuant to the taxpayer's summary judgment motion. Therefore, I recommend that NTL 00 0000000000000 be cancelled.

7/27/02

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Mimi Brin
Administrative Law Judge